Lee Lai Cheng (suing as the next friend of Lim Chee Zheng and herself) v Lim Hooi Teik

HIGH COURT (GEORGETOWN) — CIVIL SUIT NO 22–587 OF 2004
LIM CHONG FONG JC
31 OCTOBER 2016

Civil Procedure — High Court — Power — Defendant refused to acknowledge child as his son — Plaintiff brought action against defendant claiming for maintenance and declaration compelling defendant to undergo DNA test to determine paternity of child — Whether there was statute empowering court to order defendant to undergo DNA test — Whether court empowered by art 8(1) and (2) of the Federal Constitution, art 7 of the United Nations Convention on the Rights of the Child and inherent jurisdiction under O 92 r 4 of the Rules of Court 2012 to order defendant to undergo DNA test

Evidence — Burden of proof — Prima facie case — Defendant refused to acknowledge child as his son — Plaintiff brought action against defendant claiming for maintenance and declaration compelling defendant to undergo DNA test to determine paternity of child — Whether there was prima facie case of close and intimate relationship between plaintiff and defendant based on testimonies of the witnesses and circumstantial evidence

Family Law — Children — Paternity — Defendant refused to acknowledge child as his son — Plaintiff brought action against defendant claiming for maintenance and declaration compelling defendant to undergo DNA test to determine paternity of child — Whether there was prima facie case of close and intimate relationship between plaintiff and defendant — Whether defendant should be ordered to undergo a DNA test

In year 1993, the plaintiff had entered into a commercial contract ('the agreement') with the defendant's company known as Follow Me Sdn Bhd ('the company') to sing and record song albums for the company. After the execution of the agreement, the relationship between the plaintiff and the defendant became close resembling that of a husband and wife couple which lasted for eight years. During the said period, the defendant provided the plaintiff with a condominium ('the said condominium'), a Mercedes-Benz car, monthly allowances and a trip to China. The defendant also stood as guarantor for the plaintiff's UOB overdraft. The conflict between the parties started when the plaintiff became pregnant in year 2000. The defendant asked the plaintiff to abort the foetus but the plaintiff refused to do so. The defendant also refused

to acknowledge the child as his son when the child was born. Consequently, the plaintiff brought the present action claiming for maintenance and a declaration compelling the defendant to undergo a DNA test to determine the paternity of the child. With regards to the DNA test, the plaintiff relied on art 8(1) and (2) of the Federal Constitution ('the Constitution') as well as art 7(1) of the United Nations Convention on the Rights of the Child ('UNCRC'). In defence, the defendant submitted that there was no cogent proof of sexual relationship between him and the plaintiff that resulted in the conception of the child. The defendant further referred to ss 12 and 13 of the Deoxyribonucleic Acid (DNA) Identification Act 2009 ('the Act') and submitted that there was no law in Malaysia to compel a person to undergo a DNA test without his consent to ascertain paternity. The issues for consideration were whether there was a prima facie case of close and intimate relationship between the plaintiff and the defendant; and whether the defendant should be ordered to undergo a DNA test.

Held:

(1) The court found that the plaintiff was a truthful witness because she was candid and gave straight and honest answers even under intense cross-examination by opposing counsel. On the contrary, the court found the defendant to be a taciturn and evasive witness from his answers and demeanor in court. The existence of sexual relationship or otherwise had to be primarily determined from the conflicting testimony between the plaintiff and the defendant. In the present case, the court believed the plaintiff instead of the defendant. This was a civil case that did not require corroboration unlike that in sexual crime cases (see paras 29 & 35–36).

(2) The plaintiff's testimony was backed by several instances of corroborative evidence in support thereof. Firstly, the court's findings that the defendant caused the company to employ the plaintiff because he had strong personal feelings for her; and that the defendant and the plaintiff had cohabitated in the said condominium for several years intermittently, underpinned the occurrence of sexual intercourse between the parties. Secondly, the defendant had withdrawn himself as the guarantor for the plaintiff's overdraft facilities, terminated his relationship with the plaintiff and cut off all his financial support for her. Thirdly, the defendant's mother who had visited the child often and was photographed together with the child holding him adorably. Fourthly, the defendant never challenged that the plaintiff was promiscuous and that the child was fathered by another man. Fifthly, the child had testified that he was visited by the defendant's mother and his third younger brother when the child lived at the said condominium. Lastly, there was close facial resemblance between the child and the defendant (see paras 30, 33 & 37–42).

(3) On the totality of the evidence, the plaintiff had successfully established a prima facie case on the balance of probabilities that there was a close and intimate relationship between the plaintiff and the defendant that probably led to the birth of the child. There were both the opportunity and disposition of the parties to do so in the circumstances (see paras 43 & 74).

(4) It is plain that the Act has no application to civil disputes. Article 8 of the Constitution was irrelevant to the present dispute because it does not confer the right to pedigree, such as the right of the minor to know his or her true identity and to have possibility of contact with each natural parent. With regards to article 7 of the UNCRC, the said provision must be read together with s 13 of the Births and Deaths Registration Act 1957. The former confers upon the child the right to know the identity of his or her father but the latter exempts the father from giving any information concerning the birth of the child. The exemption would comprise the knowledge communicated and received by the father pertaining to the facts of conception until birth of the child. The exemption does not extend to the father undergoing a DNA test for purposes of determining paternity (see paras 58, 66 & 68).

(5) The parties were unable to point to the court a statute that empowered the court to order the defendant to undergo DNA testing in the circumstances of the case. Further, the court's inherent jurisdiction and power is a limited one to prevent injustice or to prevent abuse of process of the court. Order 92 r 4 of the Rules of Court 2012 is only defensive in nature to abate procedural injustice. In other words, the inherent power cannot be utilised to invoke or facilitate a substantive right, albeit unjustly denied. Based on the above findings, the court did not have the power to order the defendant to undergo DNA testing whether through the taking of blood, intimate or non-intimate samples even where hurt would not be inflicted on to the person (see paras 71–74).

[Bahasa Malaysia summary

Pada 1993, plaintif telah memasuki kontrak komersial ('perjanjian tersebut') dengan syarikat defendan yang dikenali sebagai Follow Me Sdn Bhd ('syarikat tersebut') untuk menyanyi dan merakamkan album lagu untuk syarikat tersebut. Selepas pelaksanaan perjanjian tersebut, hubungan antara plaintif dan defendan menjadi rapat seperti pasangan suami isteri yang berlangsung selama lapan tahun. Sepanjang tempoh tersebut, defendan telah memberikan plaintif sebuah kondominium ('kondominium tersebut'), sebuah kereta Mercedes-Benz, elaun bulanan dan satu perjalanan ke Negara China. Defendan juga menjadi penjamin untuk overdraf UOB plaintif. Konflik antara pihak-pihak bermula apabila plaintif mengandung pada 2000. Defendan meminta plaintif menggugurkan kandungan itu tetapi plaintif enggan berbuat demikian. Defendan juga enggan mengakui anak itu sebagai anak lelakinya

apabila anak itu dilahirkan. Berikutan itu, plaintif telah memulakan tindakan ini dengan menuntut nafkah dan deklarasi memaksa defendan menjalani ujian DNA untuk menentukan perihal bapa anak itu. Berhubung ujian DNA itu, plaintif bergantung kepada perkara 8(1) dan (2) Perlembagaan Persekutuan ('Perlembagaan') dan juga perkara 7(1) Konvensyen Bangsa Bersatu berhubung Hak Kanak-Kanak ('UNCRC'). Dalam pembelaan, defendan berhujah bahawa tiada bukti kukuh tentang hubungan seksual antara dia dan plaintif yang mengakibatkan plaintif mengandung dengan anak itu. Defendan selanjutnya merujuk kepada ss 12 dan 13 Akta Identifikasi Asid Deoxyribonucleic (DNA) 2009 ('Akta tersebut') dan berhujah bahawa tiada undang-undang di Malaysia yang memaksa seseorang menjalani ujian DNA tanpa persetujuannya bagi memastikan perihal bapa. Isu-isu untuk dipertimbangkan adalah sama ada terdapat kes prima facie tentang hubungan rapat dan intim antara plaintif dan defendan; dan sama ada defendan patut diperintahkan menjalani ujian DNA.

Diputuskan:

(1) Mahkamah mendapati bahawa plaintif adalah saksi yang boleh dipercayai kerana dia seorang yang terang dan memberi jawapan yang lurus dan jujur walaupun di bawah pemeriksaan balas yang tegang oleh peguam lawan. Sebaliknya, mahkamah mendapati defendan menjadi saksi yang pendiam dan mengelak daripada menjawab soalan dan sikap di mahkamah. Kewujudan hubung aseksual atau sebaliknya perlu ditentukan terutamanya berdasarkan testimony bercanggah antara plaintif dan defendan. Dalam kes ini, mahkamah mempercayai plaintif dan bukan defendan. Ini adalah kes sivil yang tidak memerlukan sokongan tidak seperti kes jenayah seksual (lihat perenggan 29 & 35–36).

(2) Testimoni plaintif telah disokong oleh beberapa keterangan sokongan yang menolong. Pertama, penemuan mahkamah bahawa defendan telah menyebabkan syarikat mengambil plaintif bekerja kerana dia mempunyai perasaan peribadi yang mendalam terhadapnya; dan bahawa defendan dan plaintif telah tinggal bersama dalam kondominium tersebut selama selang seli beberapa tahun, disokong dengan terjadinya hubungan seks antara pihak-pihak itu. Kedua, defendan telah menarik dirinya sendiri sebagai penjamin untuk kemudahan overdraf plaintif, telah menamatkan hubungannya dengan plaintif dan memutuskan semua bantuan kewangannya terhadapnya. Ketiga, ibu defendan yang sering melawat anak itu dan telah mengambil foto bersama dengan anak itu dengan memegangnya penuh kasih sayang. Keempat, defendan tidak pernah mencabar bahawa plaintif seorang yang rambang dan bahawa anak itu adalah anak lelaki lain. Kelima, anak itu telah memberi keterangan bahawa dia telah dilawati oleh ibu defendan dan adik lelaki ketiganya apabila anak itu tinggal di kondominium tersebut. Akhirnya,

terdapat mirip muka yang sama antara anak itu dan defendan (lihat perenggan 30, 33 & 37–42).

(3) Berdasarkan keseluruhan keterangan, plaintif telah berjaya membuktikan kes prima facie atas imbangan kebarangkalian bahawa terdapat hubungan yang rapat dan intim antara plaintif dan defendan yang berangkali telah membawa kepada kelahiran anak itu. Terdapat kedua-dua peluang dan kedudukan pihak-pihak untuk berbuat sedemikian dalam keadaan tersebut (lihat perenggan 43 & 74).

(4) Adalah jelas bahawa Akta tersebut tidak terpakai kepada pertikaian sivil. Perkara 8 Perlembagaan adalah tidak relevan dengan pertikaian ini kerana ia tidak memberi hak kepada salasilah, seperti hak seorang kanak-kanak kecil untuk mengetahui identiti sebenarnya dan untuk mempunyai kebarangkalian berhubung dengan setia ibu bapa semulajadi. Berhubung perkara 7 UNCRC, peruntukan tersebut perlu dibaca bersama s 13 Akta Pendaftaran Kelahiran dan Kematian 1957. Perkara 7 UNCRC memberi kanak-kanak itu hak untuk mengetahui identiti bapanya tetapi s 13 Akta Pendaftaran Kelahiran dan Kematian 1957 mengecualikan bapa daripada memberi apa-apa maklumat berkenaan kelahiran anak itu. Pengecualian itu terdiri daripada pengetahuan yang diberitahu dan diterima oleh bapa berkaitan fakta kandungan itu sehingga kelahiran anak itu. Pengecualian itu tidak dilanjutkan kepada bapa itu perlu menjalani ujian DNA bagi tujuan menentukan perihal bapa (lihat perenggan 58, 66 & 68).

(5) Pihak-pihak tidak dapat menunjukkan kepada mahkamah suatu statut yang memberi kuasa kepada mahkamah untuk memerintah defendan untuk menjalani ujian DNA dalam keadaan kes itu. Selanjutnya, bidang kuasa dan kuasa sedia ada untuk menghalang penyalahgunaan proses mahkamah. Aturan 92 k 4 Kaedah-Kaedah Mahkamah 2012 hanya bersifat defensif untuk mengurangkan ketidakadilan prosedur. Dalam erti kata lain, kuasa sedia ada tidak boleh digunakan atau memudahkan hak substantif, walaupun dinafikan secara tidak adil. Berdasarkan penemuan di atas, mahkamah tidak mempunyai kuasa untuk memerintah defendan menjalani ujian DNA sama ada dengan mengambil darah, sampel intim atau tidak intim walaupun kesakitan tidak akan dilakukan ke atas seseorang itu (lihat perenggan 71-74).]

Notes

For cases on paternity see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4031–4033.

For cases on power, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3947–3948.

For cases on prima facie case, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 971–974.

Cases referred to

Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors [2005] 3 MLJ 681, FC (refd)
Brabakaran v PP [1966] 1 MLJ 64, FC (refd)
Chieng Kon Ming (M) v Voon Lam Sze (f) (Leong Siew Ching (f), party cited) [2008] MLJU 1092; [2013] 4 BLR 326, HC (refd)
GGC v CCC & Anor [2016] MLJU 377, HC (refd)
F (A Minor) (Blood Tests: Parental Rights), In re [1993] Fam 314, CA (refd)
Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)
Lai Meng v Toh Chew Lian [2012] 8 MLJ 180, HC (refd)
Lau Siang Kok, Lionel v Lau Chon Kun @ Lau Yu Chak, Datuk Seri Panglima [2013] 2 MLJ 889, CA (folld)
Lau Zhan Chen v Makoto Togase & Ors [1994] MLJU 344; [1995] 1 CLJ 841, HC (refd)
Mayland Lending Sdn Bhd v Rossmaizati bt Mohamad & Anor [2015] 7 MLJ 216, HC (refd)
Ng Chian Perng (sued by her mother and next friend Wong Nyet Yoon) v Ng Ho Peng [1998] 2 MLJ 686, HC (refd)
Peter James Binsted v Juvencia Autor Partosa [2000] 2 MLJ 569, HC (refd)
PP v Tengku Mahmood Iskandar & Anor [1973] 1 MLJ 128 (refd)
Pushpah a/p MSS Rajoo v Malaysia Co-Operative Insurance Society Ltd & Anor [1995] 2 MLJ 657, HC (refd)
H and A (Paternity: Blood Tests), Re [2002] 1 FLR 1145, CA (refd)
L, Re [1968] 1 All ER 20, CA (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd)
Subramaniam v PP [1956] 1 MLJ 220, PC (refd)

Legislation referred to

Births and Deaths Registration Act 1957 s 13
Child Act 2001
Civil Law Act 1956 ss 3(1)(a), (1)(b), (1)(c)
Courts of Judicature Act 1964
Deoxyribonucleic Acid (DNA) Identification Act 2009 ss 12, 13
Evidence Act 1950 s 114
Family Law Reform Act 1969 [UK] s 20(1)
Federal Constitution arts 8, 8(1), (2), 121(1), Part II
Rules of Court 2012 O 14A, O 92 r 4

T Tharumarajah (T Tharuma & Assoc) for the plaintiff.
Tan Kah Hoo (Loh Li Lian with him) (Gan Teik Chee & Ho) for the defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an action brought by the mother as next friend of the child against the putative father who refused to admit to the paternity of the child.

[2] The plaintiff is presently 49 years of age and the mother of Lim Chee Zheng ('child') who is now 15 years of age. She is unmarried. The plaintiff has commenced this action on behalf of her son in a representative capacity.

[3] The defendant is presently 70 years of age and the managing director of Follow Me Sdn Bhd. He is married with several children.

[4] The plaintiff claimed that the defendant is the father of the child.

PRELIMINARY

[5] This action was filed in 2004. In the plaintiff's statement of claim, the plaintiff principally pleaded as follows:

> [3] Perkenalan diantara plaintif dan defendan bermula sewaktu mereka bertemu di sebuah pusat hiburan dan perhubungan menjadi betambah rapat apabila plaintif ditawarkan satu kontrak komersial sebagai seorang penyanyi di Syarikat Follow Me Sendirian Berhad di atas permintaan pihak defendan. Perhubungan plaintif dan defendan menjadi rapat dan intim semenjak kontrak tersebut bermula.
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> [4] Perhubungan diantara plaintif dan defendan tersebut berterusan selama sembilan tahun dan di dalam tempoh tersebut, plaintif dan defendan telah berulang kali melakukan hubungan persetubuhan seperti suami dan isteri.
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> ...
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> [6] Hasil daripada perhubungan intim seperti suami isteri tersebut plaintif telah melahirkan seorang anak lelaki iaitu Lim Chee Zheng pada 16/11/2000 di Hospital Perak Darul Ridzuan.
>
> [7] Walaupun plaintif telah menegaskan bahawa anak yang dilahirkan adalah hasil daripada perhubungan sulit antara plaintif dan defendan, dan defendan telah menafikan anak tersebut dan seterusnya telah abai dan atau cuai untuk bertanggungjawab terhadap plaintif dan anaknya samada dari segi nafkah, perlindungan dan atau sokongan sebagai bapa.
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> ...
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> [11] Plaintif menuntut daripada defendan nafkah anak dan tanggungan diri:
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> Butir-Butir Tuntutan
>
> (a) Makanan serta minuman anak yang berkhasiat;

(b) Perbelanjaan pakaian ubat-ubatan dan pelbagai;

(c) Kesemua perbelanjaan yang telah dikeluarkan oleh plaintif sehingga sekarang untuk kegunaan anak sehingga anak berumur 18 tahun dan atau seperti di bawah undang-undang yang sedia ada;

(d) Membiayai pendidikan anak tersebut sehingga tahap university dan sehingga anak tersebut cukup umur dan boleh menyara diri sendiri;

(e) Segala perbelanjaan perubatan atau secara alternative mengambil satu insuran polisi insurans untuk anak tersebut untuk membiayai perbelanjaan perubatan/pendidikan;

(f) Pelbagai perbelanjaan yang akan timbul daripada pembesaran anak tersebut termasuk lain-lain kemudahan dan kepentingannya. (sebagaimana yang ditaksirkan oleh Mahkamah).

[12] Plaintif memerlukan wang seperti berikut untuk diri sendiri:

(a) Kos menjaga anak sehingga anak berumur 18 tahun dan/atau mencapai rezekinya — RM 1,000.00 sebulan dan berterusan;

(b) Nafkah anak dan diri/plaintif — RM 3,000.00 sebulan dan berterusan.

[13] Oleh itu plaintif memohon seperti berikut:

(a) Perintah seperti dalam buti-butir tuntutan;

(b) Defendan diperintah menjalani satu ujian DNA di Hospital kerajaan atau di Hospital lain yang difikirkan sesuai oleh mahkamah untuk menentukan paterni anak tersebut diatas;

(c) Semua perbelanjaan plaintif yang berhasil daripada ujian DNA berserta kos laboratory dan ujian-ujian lain yang berkaitan ditanggung oleh defendan;

(d) Satu deklarasi anak tersebut adalah anak defendan yang sah;

(e) Faedah dengan kadar 8% setahun atas jumlah wang tersebut dari tarikh ini hingga tarikh pembayaran sepenuhnya;

(f) Perintah-perintah lain serta relief yang suai manfaat dan apabila diperlukan (consequential orders as and when necessary);

(g) Kos; dan

(h) Lain-lain perintah yang difikirkan wajar dan munasabah oleh Mahkamah yang mulia ini.

[6] The plaintiff previously filed an application pursuant to O 14A of the Rules of Court 2012 to order the defendant to undergo a DNA test in order to determine the paternity of the child.

[7] On 8 February 2013, Zamani bin A Rahim J (now JCA) allowed the

plaintiff's aforesaid application based on the inherent power and discretion of the court ('decision').

[8] Upon the defendant's appeal to the Court of Appeal, the decision was set aside on 19 October 2015. The Court of Appeal was of the opinion that this is not an appropriate case for the disposal on a point of law without the full trial of the action. In addition, it is the view of the Court of Appeal that before an order can be made to compel the defendant to undergo a DNA test to determine the paternity of a minor, the plaintiff must have made out a prima facie case against the defendant.

[9] Accordingly, the trial of the action came before me. At pre-trial case management, it was consented by all that the trial would be undertaken in two instalments. The first instalment would be to determine whether there is a prima facie case of close and intimate relationship between the plaintiff and the defendant and consequently whether the defendant should be ordered to undergo a DNA test. If both are affirmatively found, then the second instalment would be continued to determine the paternity of the child and the appropriate consequential reliefs.

[10] The trial of the first installment took place on 16 June 2016 and 4 July 2016. The trial documents were marked as Bundles A to H including the documentary evidence in Bundles B, C, D and H which were agreed to by the parties to be of status B.

[11] The following witnesses testified at the trial:

(a) Lee Lai Cheng ('PW1'), the plaintiff herself;

(b) Lim Chee Zheng ('PW2'), the child himself; and

(c) Lim Hooi Teik ('DW3'), the defendant himself.

[12] After the close of the trial of the first instalment, the parties simultaneously submitted their closing written submissions-in-chief and reply as directed by me. Oral clarification with counsel was held on 14 September 2016.

COMMON BACKGROUND FACTS

[13] There are minimal common facts here because the defendant denied most of the plaintiff's allegations and put her to strict proof thereof. Thus, the following represent the only common background facts before me.

[14] The plaintiff and the defendant on behalf of Follow Me Sdn Bhd

executed a commercial contract on 1 January 1993 wherein the plaintiff was appointed to perform such musical work for the purposes of making sound recordings as designated by Follow Me Sdn Bhd exclusively.

[15] The plaintiff went with the defendant as well as with the plaintiff's sister and friends for a tour to China in March 1998.

[16] The defendant guaranteed the plaintiff's overdraft account No 66–1047536–9 obtained from Overseas Union Bank (M) Bhd in Ipoh, Perak ('OUB overdraft').

CONTENTIONS AND FINDINGS

[17] According to the plaintiff, she got to know the defendant in 1993 at an entertainment centre. The defendant thereafter offered the plaintiff a singing engagement and accordingly caused his company Follow Me Sdn Bhd to enter into a commercial contract with the plaintiff to sing and record song albums for the company. This was denied by the defendant because the plaintiff wasn't a famous and popular singer known to many people. According to the defendant, the plaintiff was just another one of other singers appointed by Follow Me Sdn Bhd. The plaintiff claimed that the aforesaid commercial contract was executed by them concurrently but the defendant claimed that it was executed separately witnessed by Chew Kim Huat only. However Chew Kim Huat was not called as a witness.

[18] The plaintiff claimed that her relationship with the defendant became close after the execution of the commercial contract with Follow Me Sdn Bhd. It was a relationship that lasted for eight years resembling that of a husband and wife couple. They went for trips abroad including to China. The defendant bought her a Mercedes-Benz 230SE bearing registration No PCV 1818. He paid the initial deposit of RM40,000 for the car and gave the plaintiff the sum of RM1,700 monthly to pay for the car installment. In addition, the defendant gave the plaintiff a personal monthly living allowance of RM5,000 to RM6,000. These were all denied by the defendant except for the China trip.

[19] Moreover the plaintiff claimed that the defendant in 1997 bought for her a condominium at Marina Bay bearing residential address Block C, 7–8–75 Jalan Tanjong Tokong, 10470 Penang, Malaysia. The defendant paid RM100,000 for the initial payment and RM60,000 for renovation of the condominium. The defendant also paid the RM1,500 monthly installment payment for the condominium through the plaintiff's Maybank overdraft account No 0–07013–325842 ('Maybank overdraft'). The defendant again denied all these allegations.

[20] According to the plaintiff, the fact that the plaintiff and defendant lived in the Marina Bay condominium was known to other people who had visited them there including the plaintiff's sister and a Mr Wong from the *China Press* who is a close friend of the defendant.

[21] The plaintiff further claimed that she also had intimate sexual relationship with the defendant in the Marina Bay condominium and conceived the child in 2000. This fact was known to the defendant's mother, the late Cheah Siew Ying and his siblings Lim Hooi Meng @ Lim Xuang Xi, Lim Hooi Huat and Lim Huai Hai. The defendant strenuously denied those assertions.

[22] According to the plaintiff, the defendant wanted the plaintiff to abort the foetus upon learning from her of the conception of the child. However by reason of the plaintiff's refusal to do so, the defendant terminated the relationship with the plaintiff. The plaintiff also stopped paying for the monthly installment payments of the Marina Bay condominium and applied to the Oversea Union Bank (M) Bhd in Ipoh to withdraw himself as the guarantor of the OUB overdraft. Save for the aforesaid application to withdraw himself as guarantor, the defendant again denied all these allegations.

[23] The child was born on 16 November 2000. The defendant refused to acknowledge the child as his son. That notwithstanding, the plaintiff claimed that the defendant's late mother was still close to her and the child and frequently visited them at the Marina Bay condominium.

[24] As the result of the defendant's refusal to continue to financially support the plaintiff, the plaintiff was ultimately constrained to sell off the Marina Bay condominium in the mid 2000s. She brought this action, amongst others, for her maintenance as well as that of the child.

[25] This is another case that has to be resolved based largely on the conflict of sworn testimony between two material witnesses, to wit: the plaintiff and the defendant. Obviously the burden of proof is upon the plaintiff.

[26] In *Mayland Lending Sdn Bhd v Rossmaizati bt Mohamad & Anor* [2015] 7 MLJ 216, I have held as follows in similar circumstance of conflict:

> [25] It is seen that certain evidence adduced on the factual issues are in conflict from the testimony of the witnesses of the parties particularly that between the plaintiff and first defendant. The resolution of the conflict necessarily requires the application of to, to wit:
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> 101 Burden of Proof
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> (1) Whoever desires any court to give judgment as to any legal right or liability,

on the existence of facts which he asserts, must prove that those facts exist. A

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102 On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. B

103 Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. C

[26] The interpretation and application of these provisions are lucidly explained by Augustine Paul JC (as he then was) in *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697: 'It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party ... what shifts is the responsibility of adducing evidence to discharge that burden ... When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witness or by giving evidence himself or a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail. If the party whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail to him to turn around and say that the respondent has not established his'. D E F

[27] In this regard, I must add that it is incumbent on the party where the burden lies to first adduce evidence that is believable to satisfy the court he has discharged his evidential burden before the burden shifts to the other party to rebut it by different methods as alluded by His Lordship. The rebuttal may then either result in the evidence originally adduced continues to be believable or become discredited. The evaluation of the evidence for believability and veracity will principally include the demeanor of the witness as observed by the court and testing their testimony for consistency with the pleadings, testimony of other witnesses and the contemporaneous documentary evidence. Actions and inactions of the parties at the material time of the occurrence of the factual events are also duly examined particularly any explanation to justify them. Ultimately the court will critically weigh all the evidence adduced by both parties and make the determination as to whether the party that bears the burden has proved the fact in issue on the balance of probabilities. G H

[27] That notwithstanding, I am further entitled to rely either exclusively on the circumstantial evidence that has emerged before me; otherwise partially in corroboration of the sworn testimony. In *GGC v CCC & Anor* [2016] MLJU 377, Lee Swee Seng J said as follows in respect of the exclusive usage of circumstantial evidence in an adultery case: I

A [53] Based on the cases cited above, for allegation of adultery to be established, the evidence must be beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial, the court will not draw the inference of guilt unless the facts relied on are not B reasonably capable of any other explanation. In dealing with circumstantial evidence the court have to consider the weight which is to be given to the united force of all the circumstances put together.

[28] Since this is a civil case, the standard of proof is on the balance of C probabilities. I noted that by reason of the recent Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, the court in *GGC v CCC & Anor* adopted the civil standard of proof for adultery too which is by nature essentially a fraud on the spouse.

D **[29]** Between the plaintiff and the defendant, I find that the plaintiff is a truthful witness. She was candid and gave straight and honest answers even under intense cross-examination by opposing counsel. On the other hand, I find the defendant to be a taciturn and evasive witness from his answers and E demeanor in court. He steadfastly clung on to the strategy that it is for the plaintiff to prove her case. It is hence unsurprising to me that he merely denied each and every assertion of the plaintiff except for those that could not be contradicted because of the availability of documentary evidence that supports the assertions. I am mindful that the defendant in retort in his closing F submissions also attempted to point out several purported discrepancies in the plaintiff's testimony. However they are in my view minor inconsistencies, if any, in view of the length of time that had elapsed.

[30] In the circumstances and the evidence adduced before me, I believe the G plaintiff's story. I am satisfied and find that the defendant was infatuated with her after their initial meeting at the entertainment centre in 1993. The infatuation led to the defendant in deciding to award the singing contract to the plaintiff. I am aware that Follow Me Sdn Bhd employed other singers too because that was the object of the company. Nevertheless, I believe the H plaintiff's testimony that she was the first female singer to be employed by Follow Me Sdn Bhd and I am convinced that the defendant caused Follow Me Sdn Bhd to employ the plaintiff because he had strong personal feelings for her.

[31] I am further satisfied and find that the relationship between the plaintiff I and the defendant evolved and developed to that of lovers. This is evident from the photograph of them during their tour to China in March 1998. According to the plaintiff, they stayed in the same room in the hotel. The defendant has conceded that they were photographed holding hands which I must add rather lovingly from my inspection of that candid photo shot.

[32] The development of their relationship is supported also by the plaintiff's testimony that the defendant took good care of her financial well being. I accept that the defendant bought for her a Mercedes-Benz 230SE car bearing registration No PCV 1818 and paid her monthly living allowances too. It is a common fact that the defendant also stood as guarantor for the plaintiff's OUB overdraft. I am cognisant that the defendant attempted to justify that he had also stood as guarantor for the other employees of Follow Me Sdn Bhd but I find that a feeble explanation on the probabilities of the case. Put simply. I find it incredulous. In any event, the defendant did not produce any documentary evidence to substantiate his allegation which ought to have been available.

[33] I am also satisfied and find that the defendant bought the Marina Bay condominium for the plaintiff as testified by her. They cohabited there for several years intermittently.

[34] The crucial issue and main plank of defence advanced by the defendant is that there is no cogent proof of sexual relationship between the plaintiff and the defendant that resulted in the conception of the child. The most cogent proof in such instances would either be an admission by the defendant or testimony and/or photographic records captured by a third party witness such as that by a private investigator in an adultery case commonly. The former was obviously unavailable. Likewise the latter too because no ordinary and sensible person would have pre-arranged for it in such circumstance as in the present case unlike that by a suspecting spouse seeking to establish the adulterous affair of the other spouse. The court will hence have to do the best it can in the circumstances.

[35] The existence of sexual relationship or otherwise here has to be therefore primarily determined from the conflicting testimony between the plaintiff and the defendant. Again I believe the plaintiff instead of the defendant.

[36] That notwithstanding, this is a civil case that does not require corroboration unlike that in sexual crime cases. Nonetheless as a precautionary measure, I was on the lookout for corroborative evidence: both circumstantial and documentary. In the Federal Court case of *Brabakaran v Public Prosecutor* [1966] 1 MLJ 64, Ong ACJ held that:

> Corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally well be afforded by established facts and the logic of established facts sometimes speaks even more eloquently than words.

[37] In this regard, I am satisfied that the plaintiff's testimony is backed by

several instances of corroborative evidence in support thereof. Firstly, I refer to my findings in paras 30–33 above that underpinned the occurrence of sexual intercourse between the parties. I rely on s 114 of the Evidence Act 1950 which reads as follows with emphasis added:

> The court may presume the existence of any fact which it think likely to have happened, regard being had to the common course of natural events, *human conduct*, and public and private business, in their relation to the facts of the particular case.

[38] Secondly, the plaintiff testified that the defendant threatened to withdraw himself as the guarantor of her OUB overdraft facilities if she refused to abort the foetus. The defendant actually executed his threat on around June 2000 about four months before the child was born. In addition, the defendant thereafter terminated the relationship with the plaintiff and cut off all his financial support for her.

[39] Thirdly, the defendant's mother actually visited the child often and was photographed together with the child holding him adorably.

[40] Fourthly, I noticed the defendant never challenged that the plaintiff was promiscuous and that the child was fathered by another man.

[41] Fifthly, the child has testified that he was visited by the defendant's mother and his third younger brother when the child lived at the Marina Bay condominium. Even after the child left with the plaintiff to live in Ipoh, he re-established communication with the defendant's third younger brother vide Facebook and V-Chat in 2013 for about a year and again recently in 2016. According to the child, the defendant's third younger brother exchanged greetings and invited the child to look him up in Penang. I have no reason to doubt the truthfulness of the child's testimony. I am aware that the defendant challenged the testimony of the child here as hearsay but I am accepting it not as to the truth of the defendant's third younger brother's statements but the fact they were made to the child: see *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220. Furthermore, the defendant's younger brother maintains a Malayan Banking Bhd's account No 107237025928 for the child as trustee even as at 15 June 2016. If the child is not in any way connected with the defendant, it is highly unlikely that his younger brother would have treated the child in the way he did especially the maintenance of the trust account for him as beneficiary.

[42] Sixthly, I have also carefully looked at the faces of the child and the defendant when they testified before me and my conclusion is that there is close facial resemblance between both of them. For comparative purposes, I also saw the face of one of the defendant's legitimate son present in court who was

identified to me at my request. I am nonetheless mindful that facial resemblance per se is inconclusive as held by Abdul Kadir Sulaiman J (later FCJ) in *Ng Chian Perng (sued by her mother and next friend Wong Nyet Yoon) v Ng Ho Peng* [1998] 2 MLJ 686 as follows at p 693:

> [6] The learned magistrate had rightly rejected the request of the appellant to observe and compare the similarity in the appearance of the respondent and the subject child to establish that the respondent was the father. According to *Sarkar's Law of Evidence*, resemblance of features as evidence of paternity, in cases of bastardy, inheritance or seduction, has been a matter of some controversy. The evidence is of little value, very unsafe and conjectural (*Russel v Russel & Meyer*).

[43] On the totality of the evidence before me, I am therefore satisfied that the plaintiff has successfully established a prima facie case on the balance of probabilities that there was a close and intimate relationship between the plaintiff and the defendant that probably led to the birth of the child. There were both the opportunity and disposition of the parties to do so in the circumstances.

[44] Moving on to the second issue of compelling the defendant to undergo a DNA test, this is purely a question of law as to whether the court is empowered to so order the defendant.

[45] The plaintiff referred to the case of *Lau Zhan Chen v Makoto Togase & Ors* [1994] MLJU 344; [1995] 1 CLJ 841 that DNA testing taken from blood samples would be conclusive evidence of paternity. In that case Abdul Malik Ishak J (later JCA) said as follows at pp 884–885 with emphasis added:

> *In my judgment, where scientific evidence by means of a blood test, can resolve the issue of paternity conclusively, the interests of justice require that a blood test should be done, in the absence of strong reasons to the contrary*.
>
> On blood tests, Lord Denning MR had this to say in *Re L* [1968] 1 ALL ER 20 at p 23:
>
> > Blood tests are a modern development. Medical science is able to put the blood of individuals into definite groups; and by examining the blood of a given man and a child, the medical men can tell whether the man could or could not be the father of the child. They cannot say positively of any man that he is the father; but they can say positively that a given man cannot be the father, because the blood groups of him and the child are so different. The science has achieved such a degree of accuracy that, when a man is in truth not the father of a child, and desires to prove it, there is at least a seventy per cent chance, if blood tests are taken, that the doctors can prove positively that he is not the father. In some cases the chance is even higher.
> >
> > As, for instance, when, as in the present case, we know that one or other of two given men is the father, there is a ninety percent chance that the doctors can say

positively that one of them is not the father, with the irresistible inference that the other man is the father.

The facts in *Re L* can be stated thus. The husband and wife were married in 1947. Since 1956 the wife had been committing adultery with the party cited, unknown to the husband. In 1958 a child was born to her. In December 1963, the wife petitioned for divorce. In May 1964, the husband filed an answer alleging adultery by the wife with the party cited. Both the petition and the answer contained prayers for the custody of the child. In October 1964, the wife left the husband, taking the child with her. In March 1965, the husband first became aware that he might not be the father of the child. In July 1965, a decree nisi was made at the hearing of the case undefended on the husband's answer, and an issue of the paternity of the child was directed. The wife and the party cited then admitted that they had committed adultery since 1956. The adult parties to the issue desired that the child's blood group should be ascertained, and each of the adults was willing to submit to serological examination. The official solicitor, as guardian ad litum of the child, did not consent to an order for the child's blood group to be taken. On appeal from an order that the child's blood grouping should be ascertained, the order being made under the court's custodial jurisdiction, it was held that a judge of the divorce division, when exercising his custodial jurisdiction had the same jurisdiction as a judge of the chancery division in wardship proceedings, and so had power to order an infant to be subjected to a blood group test, notwithstanding that the guardian ad litem did not consent; in the circumstances of the present case the order for arrangements to be made to take the child's blood test was in the best interests of the child and should stand.

Since *Re L*, medical science has advanced by leaps and bounds. An abstract of an article written by three authors (ST Chow, KH Yap, HE Tai and WF Tan entitled 'The Application of Restriction Fragment Length Polymorphism to Disputed Paternity' published in the Annals by the Academy of Medicine, Singapore) would bring joy to those who want to file a paternity suit. That abstract reads thus:

> The Hae III restriction fragment length polymorphism (RFLP) system with four variable number tandem repeats (VNTR) loci has been used to resolve disputed paternity. The system exhibits an average power of exclusion of 99.96% and a mean probability of paternity of 99.96%. In all the casework examined, three VNTR loci provided a minimum 98.11% of probability of paternity. With four VNTR loci, the minimum probability of paternity was 99.69%. The alleged fathers in these cases were of different races: Chinese, Malay, Indian, Caucasian and Black, suggesting that the RFLP system has also been used to resolve disputed paternity cases involving related alleged fathers and cases of 'motherless children. To date, we have not observed any mutation or recombination on either the maternal or paternal alleles. These results suggest that the RFLP system with four VNTR loci can decisively resolve the biological relationship in disputed paternity cases.

The abstract so reproduced appears to be worded in a scientific jargon. But, this is not so. The authors of that article said:

> In paternity testing, the Deoxyribonucleic acid (DNA) profiles of mother, child and alleged father are compared. Assuming that maternity is not disputed, the

> child's maternal allele can be identified. The child's paternal allele is then compared with the alleged father's alleles. If a match is found, the alleged father is included as the biological father of the child, otherwise, the alleged father is excluded from paternity.

The authors of the article further itemised the probable paternity of the three major races in Singapore. They said this:

> The calculated probabilities of paternity are 99.97%, 99.97% & 99.96% for the Chinese, Malays and Indians respectively.

[46] However since the defendant has refused to undergo the DNA test willingly, the plaintiff contended that the defendant must be compelled to do so as in the decision where Zamani bin A Rahim J (now JCA) held as follows with emphasis added:

> It would appear that with varying degree of requirements or stipulations, the paternity testing may be ordered by the courts in other jurisdictions. Likewise, we too must not be lagging behind but be robust and cannot allow our criminal or civil jurisprudence be shackled by the ghost of Peter James Binsted, which was decided within a narrow scope about 13 years ago. Much water has flowed under the bridge since then. *In exercising my inherent power and discretion of the Court and indeed it is in the best interests for the minor that the defendant is hereby ordered to provide a sample for DNA testing to determine the minor's paternity*.

[47] Accordingly, the plaintiff prayed for the defendant to be compelled and ordered to undergo DNA tests using either his blood samples or oral buccal swabs tissue obtained scraped from his gum and cheek surfaces.

[48] The plaintiff further referred to the Federal Constitution and the United Nation Convention on the Rights of the child ('UNCRC') to support its stance.

[49] As to the former, the plaintiff cited arts 8(1) and 8(2) of the Federal Constitution that a minor is entitled to the equal protection of the law and therefore has the right to know who his father rightfully is through DNA testing. Articles 8(1) and 8(2) read as follows:

> 8 Equality
>
> (1) All persons are equal before the law and are entitles to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the grounds only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of

any trade, business, profession, vocation or employment.

[50] In respect of the latter, article 7(1) of the UNCRC provides as follows with emphasis added:

> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, *the right to know* and be cared for by *his or her parents*.

According to the plaintiff, the preamble in the UNCRC 'Recognizing the role and responsibility of the family in society, that they be afforded the necessary assistance to enable them to fully assume their responsibilities as the source of care, support, rehabilitation and development of children in society' has been adopted into one of the preambles of the Child Act 2001.

[51] In *Lai Meng v Toh Chew Lian* [2012] 8 MLJ 180, the best interest test promulgated in the UNCRC was adopted and applied by the court to determine the issue of access to an illegitimate child. In that case, Yeoh Wee Siam J held as follows at p 200:

> [87] The Government of Malaysia acceded to the CRC on 17 February 1995 but in a declaration dated 19 July 2010 it expressed its reservations with respect to certain articles (which did not include articles 3 and 9) and declared that the said provisions shall be applicable only if they are in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia.

For completeness, I reproduce the reservation made by Malaysia in ratifying the UNCRC which reads as follows:

> The Government of Malaysia accepts the provisions of the Convention on the Rights of the child but express reservations in respect to articles 2, 7, 14, 28 paragraph 1(a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

[52] The plaintiff therefore contended that the Federal Constitution and the UNCRC should and must be read for the purpose it was invoked by taking a purposive approach to their understanding and interpreting the law for reasons it was legislated. An order to compel an individual to submit to DNA testing does not propose harm to another but rather develops a general principle of law that is likely to provide a solution to many individual problems or of providing the answer to a specific question of a recurring nature in practice. There are no constitutional or practical reasons concerning this matter that outweighs the protection and development of the minor.

[53] The plaintiff also referred to s 20(1) of the English Family Law Reform Act 1969 which provides:

> *20 Power of court to require use of blood tests*
>
> (1) In any civil proceedings in which the paternity of any person falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person and for the taking, within a period to be specified in the direction, of blood samples from that person, the mother of that person and any party alleged to be the father of that person or from any, or any two, of those persons.
>
> *A court may at any time revoke or vary a direction previously given by it under this section.*

and the cases of *In re F (A Minor) (Blood Tests: Parental Rights)* [1993] Fam 314 and *Re H and A (Paternity: Blood Tests)* [2002] 1 FLR 1145.

[54] In rebuttal, the defendant however contended that there is no law in Malaysia to compel a person to undergo a DNA test without his consent to ascertain paternity.

[55] The defendant referred to *Peter James Binsted v Juvencia Autor Partosa* [2000] 2 MLJ 569 where KC Vohrah J (later JCA) held as follows at p 571:

> At the outset it has to be noted that the Act has no provision to allow any court to make such an order. There is no other general provision in any other legislation that allows that too. This is quite unlike the position in England where s 20 of the Family Law Reform Act 1969 confers the court 'with the power upon a formal application to direct the use of blood test to ascertain paternity ... with his consent ...'. It will be seen that even then the provision does not empower the court to order blood test and even less the power to take blood from an unwilling party. All it does is to permit a direction by the court for the use of blood to ascertain paternity.
>
> It is clear that there is no general power provided by legislation or through common law for any court in Malaysia to order a person to undergo a test to ascertain paternity. In the case of a DNA test, it is common knowledge that either a blood, tissue or bone specimen will be taken from the person for testing. If a person refuses to submit himself to such a testing he is perfectly entitled to do so; a person cannot be subject to hurt (ie suffer bodily pain, disease or infirmity) within the meaning of s 319 of the Penal Code against his will by submitting himself to such testing. Whoever carries out such testing without the person's consent would violate s 323 of the Penal Code for voluntarily causing hurt to the person and a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person.

The defendant further referred to *Chieng Kon Ming (M) v Voon Lam Sze (f) (Leong Siew Ching (f), party cited)* [2008] MLJU 1092; [2013] 4 BLR 326.

[56] I observed that subsequently in the Court of Appeal case of *Lau Siang Kok, Lionel v Lau Chon Kun @ Lau Yu Chak, Datuk Seri Panglima* [2013] 2 MLJ 889, Low Hop Bing JCA held as follows at pp 898–899 with emphasis added:

> [38] So far as we are aware, prior to this appeal, this court has no opportunity to address this question although our High Courts have dealt with the issue of DNA test under other statutory provisions. *There is no common law rule that empowers our courts to order a party to submit himself or herself to a DNA test. In our view, s 41 does not either expressly or by necessary implication require an applicant such as the plaintiff to submit himself to a DNA test. This court is not at liberty to add words to s 41 as that is the legislative function and power of Parliament. Our duty and power is to interpret the law as it is and not what as it ought to be.*
>
> [39] As alluded to above, our High Courts have considered this issue previously. By way of analogy, under other statutory provisions, this issue arose in *Peter James Binsted v Juvencia Autor Partosa* (HC). There was an application for maintenance in the magistrate's court. The learned magistrate allowed an application praying for an order that the respondent and the child undergo a DNA test. On appeal, KC Vohrah J (as he then was) set aside the magistrate's order and held that:
>
> > It is clear that there is no general power under legislation or through common law for any court in Malaysia to order any person to undergo a DNA test to ascertain paternity. If a person refuses to submit himself to such a testing, he is perfectly entitled to do so; a person cannot be subject to hurt within the meaning of s 319 of the Penal Code against his will ... a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person.

[57] According to the defendant, this position is buttressed by ss 12 and 13 of the Deoxyribonucleic Acid (DNA) Identification Act 2009 which provide as follows:

> *12 Taking of intimate sample*
>
> (1) The procedures for the taking of an intimate sample of any person under this Act shall be in accordance with the provisions of this section and as prescribed.
>
> (2) An intimate sample of:
>
> (a) a person reasonably suspected of having committed an offence;
>
> (b) a detainee; or
>
> (c) a drug dependant,
>
> may be taken for forensic DNA analysis only if —
>
> (A) an authorized officer authorizes it to be taken; and

(B) an appropriate consent in the prescribed form is given by the person from whom an intimate sample is to be taken.

(3) Subject to an appropriate consent being given under subparagraph (2)(B), an authorized officer shall only give his authorization under subparagraph (2)(A) if —

(a) he has reasonable grounds for —

(i) suspecting that the person from whom the intimate sample is to be taken has committed an offence; and

(ii) believing that the sample will tend to confirm or disprove the commission of the offence by that person;

(b) an arrest has been effected on or a detention order has been made against a detainee; or

(c) an order or a decision has been made pursuant to the Drug Dependants (Treatment and Rehabilitation) Act 1983 against a drug dependant.

(4) An authorized officer —

(a) shall give his authorization under subsection (3) in writing; or

(b) where it is impracticable to comply with paragraph (a), may give such authorization orally, in which case he must confirm it in writing as soon as may be possible.

(5) A person from whom an intimate sample is taken shall be entitled to the information derived from the analysis of the sample taken from him.

(6) An intimate sample shall only be taken by a government medical officer.

13 Taking of non-intimate sample

(1) The procedures for the taking of a non-intimate sample of any person under this Act shall be in accordance with the provisions of this section and as prescribed.

(2) A non-intimate sample of —

(a) a person reasonably suspected of having committed an offence;

(b) a detainee; or

(c) a drug dependant,

may be taken only if an authorized officer authorizes it to be taken.

(3) An authorized officer shall only give his authorization under subsection (2) if —

(a) he has reasonable grounds for —

(i) suspecting that the person from whom the non-intimate sample is to be taken has committed an offence; and

(ii) believing that the sample will tend to confirm or disprove the commission of the offence by that person;

(b) an arrest has been effected on or a detention order has been made against a detainee; or

A (c) an order or a decision has been made pursuant to the Drug Dependants (Treatment and Rehabilitation) Act 1983 against a drug dependant.

(4) An authorized officer —

(a) shall give his authorization under subsection (2) in writing; or

B (b) where it is impracticable to comply with paragraph (a), may give such authorization orally, in which case he must confirm it in writing as soon as possible.

(5) The person from whom a non-intimate sample is taken shall be entitled to the information derived from the analysis of the sample taken from him.

C

(6) A non-intimate sample shall only be taken by —

(a) a government medical officer; or

(b) a police officer or a chemist.

D

(7) If a person from whom a non-intimate sample is to be taken under this Act refuses to give the sample or refuses to allow the sample to be taken from him without good cause or the sample cannot be obtained despite all reasonable efforts taken, that person may be taken before a magistrate and the magistrate may, if satisfied that there is reasonable cause to believe that the sample tends to confirm or

E disprove the commission of an offence by that person, order that person to provide his non-intimate sample.

[58] It is plain that the Deoxyribonucleic Acid (DNA) Identification Act 2009 has no application to civil disputes. That notwithstanding, it is seen that

F consent of the person is required before DNA samples can be taken even in criminal proceedings pursuant to that Act.

[59] The defendant consequently contended that the KC Vohrah J's erudite

G decision that has been confirmed by the Court of Appeal reflected a sound policy of law. Otherwise, this might result in unimaginable chaos of a sudden surge of oblivious fathers that would in consequence lead to untold hardship on matters of inheritance. The function of the court is to interpret the law but not legislate on behalf of the legislature. If the present law is satisfactory, it will

H be for parliament to address the shortcomings in line with the principle of separation of powers.

[60] On the principle of stare decisis, I am bound by the Court of Appeal decision of *Lau Siang Kok, Lionel v Lau Chon Kun @ Lau Yu Chak, Datuk Seri*

I *Panglima* [2013] 2 MLJ 889. This is clear from the Federal Court case of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 where Ariffin Zakaria CJ held as follows at pp 170–172 with emphasis added:

[50] A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. A precedent or authority is a

legal case establishing a principle or rule that a court or other judicial body adopts when deciding in subsequent cases with similar issues or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country. The doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision-making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. *Any principle announced by a higher court must be followed in later cases. In short the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedents established by prior decisions. This legal principle is called stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of stare decisis, ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

[53] The common law tradition is built on the doctrine of stare decisis which directs a court to look to past decisions for guidance on how to decide a case before it. This means that the legal rules applied to a prior case with facts similar to those of the case now before a court should be applied to resolve the legal dispute. The use of precedent has been justified as providing predictability, stability, fairness and efficiency in the law. Reliance upon precedent contributes predictability to the law because it provides notice of what a person's rights and obligations are in particular circumstances. It also means that lawyers can give legal advice to clients based on settled rules of law. There is certainty in the law. There is also uniformity in the law. Similar cases will be treated in the same way. The use of precedent also stabilises the law.

[54] This court create precedents. The use of precedent is an indispensable foundation on which to decide what is the law and how it should be applied in individual cases ...

[61] From the Court of Appeal decision of *Lau Siang Kok, Lionel v Lau Chon Kun @ Lau Yu Chak, Datuk Seri Panglima,* there is plainly no common law power conferred upon the courts to order a person to undergo DNA tests in civil proceedings. I noted that even in the English case of *Re L* [1968] 1 All ER 20 that was cited and adopted in *Lau Zhan Chen v Makoto Togase & Ors* relied upon by the plaintiff, Willmer LJ held as follows at p 34 with emphasis added:

Since preparing this judgment I have had the advantage of reading the judgment which has now been delivered by Lord Denning, MR. Having regard to what has been said by him, I think it right to add two further observations. First, I confine my judgment with regard to the court's power to order a test of a child's blood to cases arising, as this case does, within the court's custodial jurisdiction. *I am not, as present advised, prepared to hold that such a power exists in a paternity issue*, and still less on a petition for divorce on the ground of adultery ...

[62] In the absence of common law power ordering a person to undergo DNA tests, the only other source of power available to the courts is that as conferred by the Federal Constitution and written laws.

[63] I am aware that the plaintiff has urged me to adopt the provisions in English Family Law Reform Act 1969 pursuant to s 3(1)(a) of the Civil Law Act 1956. Section 3(1) reads as follows:

> *3 Application of UK common law, rules of equity and certain statutes*
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[64] From the literal reading of s 3(1)(a), I have no doubt there is no room whatsoever for the importation of English statutes into West Malaysia unlike that in Sabah and Sarawak where English general statutes of application are received as provided in ss 3(1)(b) and 3(1)(c). A similar position was taken in *Pushpah a/p MSS Rajoo v Malaysia Co-Operative Insurance Society Ltd & Anor* [1995] 2 MLJ 657. The plaintiff's contention is hence misconceived.

[65] The plaintiff has nevertheless urged me to consider and draw upon art 8 of the Federal Constitution as well as the UNCRC. Article 8 deals with equality before the law. In *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128, Raja Azlan Shah J (later LP) explained as follows at p 129:

> ... Article 8 of our Constitution which says that all persons are equal before the law. That implies that there is only one kind of law in the country to which all citizens are amenable. With us, every citizen, irrespective of his official or social status, is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimises tyranny.

Furthermore in the Federal Court case of *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681, Abdul Malek Ahmad FCJ (later PCA) clarified on its application as follows with emphasis added:

> 13. ... To invoke art 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said Article. *Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual* ...
>
> ...
>
> 18. ... The equal protection in cl (1) of art 8 thereof extends only to persons in the same class. It recognises that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment ...

[66] It is therefore obvious that art 8 of the Federal Constitution is irrelevant to this dispute here because it is simply one between individuals that has nothing to do with contravention of rights afforded by the Legislature or the Executive arms of government. I do not think that this article can be resorted to supply an absent right. I agree with the defendant's contention that the plaintiff did not in any way even hint that the child was being sidelined and treated differently from other illegitimate persons in this country by the Legislature or Executive. The fundamental liberties enshrined in Part II of the Federal Constitution that includes art 8 do not confer the 'right to pedigree' such as the right of the minor to know his or her true identity and to have the possibility of contact with each natural parent as advanced by the plaintiff. In my view, such a right must be provided by statute.

[67] As to the UNCRC, article 7 thereof that is relied upon by the plaintiff is plainly subject to the Federal Constitution and written laws of Malaysia as specifically reserved when the UNCRC was received in this country. In this respect, s 13 of the Births and Deaths Registration Act 1957 provides as follows:

> *13 Provisions as to father of illegitimate child*
>
> Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

[68] Consequently article 7 of the UNCRC must be read together with s 13 of the Births and Deaths Registration Act 1957. Article 7 confers upon the child the right to know the identity of his/her father but s 13 exempts the father

from giving any information concerning the birth of the child. Ordinarily, the exemption would in my view comprise the knowledge communicated and received by the father pertaining to the facts of conception until birth of the child. The exemption does not in my view extend to the father undergoing a DNA test for purposes of determining paternity. That notwithstanding and since the UNCRC does not prescribe the obligation upon the father to undergo a DNA test, the power of the court to order him to do so must still be sourced from written laws since there is no equivalent common law power.

[69] The jurisdiction and power of the court are conferred by art 121(1) of the Federal Constitution which reads as follows with emphasis added:

> *121 Judicial power of the Federation*
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di- Pertuan Agong may determine;
>
> (c) *(Repealed),*
>
> and such inferior courts as may be provided by federal law and *the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*.

[70] Generally, the powers of the High Court are contained in the Courts of Judicature Act 1964 and the Rules of Court 2012 made pursuant thereto. I took time to examine the provisions therein but am unable to find one that clearly empowers me to order the defendant to undergo DNA testing in the circumstances here.

[71] Moreover the parties are unable to point to me a statute that so empowers me. The closest one is the Deoxyribonucleic Acid (DNA) Identification Act 2009 but that applies to criminal proceedings only.

[72] I am mindful that Zamani bin A Rahim J (now JCA) had previously in his decision ordered the defendant to do so pursuant to the inherent power of the court. Though I share his sentiments but I am, with respect, doubtful if I can properly so order. This is because the court's inherent jurisdiction and power is a limited one to prevent injustice or to prevent abuse of process of the court; see O 92 r 4 of the Rules of Court 2012 and I H Jacob's article 'The

Inherent Jurisdiction of the Court' Current Legal Problems (1970) 23(1): 23–52. It seems to me that the provision is only defensive in nature to abate procedural injustice. In other words, the inherent power cannot be utilised to invoke or facilitate a substantive right, albeit unjustly denied.

[73] In the premises, I am constrained to conclude that I do not have the power to order the defendant to undergo DNA testing whether through the taking of blood, intimate or non intimate samples even where hurt would not be inflicted on to the person.

CONCLUSION

[74] As to the two principal issues presently posed before me in this first instalment of the trial, I hereby summarise my findings as follows by virtue of the foregoing reasons:

(a) there was close and intimate relationship between the plaintiff and the defendant that probably led to the birth of the child; and

(b) I am not empowered to order the defendant to undergo DNA testing.

[75] I defer the issue of cost to be dealt with in the second instalment of the trial.

Order accordingly.

Reported by Dzulqarnain Ab Fatar